No. 15662

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

SYDELLE PRICE,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Arizona

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—12-6-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

CHARLES K. RICE,
Asst. U. S. Attorney General;

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United States Attorney,
U. S. Courthouse,
Phoenix, Arizona,

Attorneys for Appellant.

McLANE AND McLANE,
806 Security Building,
Phoenix, Arizona,

Attorneys for Appellee.

In the United States District Court for the District of Arizona

No. Civil 2441

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SYDELLE PRICE,

Defendant.

COMPLAINT

Now comes the United States of America by Jack D. H. Hays, United States Attorney in and for the District of Arizona, and for claim against the above-named defendant alleges as follows:

I.

Plaintiff is a corporation sovereign and body politic.

II.

This action has been authorized by the Commissioner of Internal Revenue of the United States Treasury Department and is brought under the direction of the Attorney General of the United States.

III.

Defendant Sydelle Price resides at 130 W. Berridge Lane, Phoenix, Arizona, within the jurisdiction of this Court.

IV.

On or about October 10, 1949, the Commissioner of Internal Revenue assessed for the year 1946

an income tax deficiency in the sum of $9,965.48 plus interest thereon in the sum of $1,498.09 against defendant Sydelle Price. The tax assessment list was received by the Collector on or about October 14, 1949, and notice and demand were thereafter duly made. Notice of federal tax lien was filed in the office of the County Recorder of Maricopa County, Phoenix, Arizona, on August 19, 1953. A payment of $1,500.00 was made on said assessment on or about December 12, 1950. No other payments have been made on said assessment and there now remains due and owing the United States a balance of $9,963.57 on said assessment.

V.

An offer in compromise was filed on June 13, 1950, and withdrawn on July 30, 1951. A second offer in compromise was filed on August 20, 1953, and was rejected on December 14, 1953. As a result of the filing and pendency of these two offers in compromise the time in which the United States may file an action for the collection of said tax has been extended beyond the date of the filing of this action.

Wherefore, the plaintiff prays:

1. That this Court order, adjudge and decree that defendant Sydelle Price is indebted to the plaintiff for said unpaid balance of taxes due and owing the United States in the sum of $9,963.57 plus interest as allowed by law.

2. That the plaintiff have such other and further

relief as to the Court may seem just and equitable in the premises.

JACK D. H. HAYS,
United States Attorney;

/s/ ROBERT S. MURLLESS,
Assistant U. S. Attorney.

[Endorsed]: Filed March 14, 1956.

[Title of District Court and Cause.]

ANSWER

The defendant, by her attorneys W. Lee McLane, Jr., and Nola McLane, for answer to the complaint alleges:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

The claim stated in the complaint did not accrue within six years before the commencement of this action and is therefore barred by the provisions of Section 276 (c) of the 1939 Internal Revenue Code.

Third Defense

A statutory notice of deficiency as required by Section 272 (a) of the 1939 Internal Revenue Code has not been issued to defendant, and therefore this action is prohibited by law.

Fourth Defense

Defendant admits the allegations contained in paragraphs I and III of the complaint; alleges that she is without information sufficient to form a belief as to the truth of the allegations contained in paragraphs II and IV of the complaint; and denies the allegations contained in paragraph V of the complaint.

Wherefore, it is prayed that the plaintiff's prayer for relief be denied.

/s/ W. LEE McLANE, JR.,

/s/ NOLA McLANE,

Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 28, 1956.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

(1) Of the Truth of Matters of Fact and
(2) Genuineness of Documents
(Fed. R. of Civ. P., Rule 36, Title 28 U.S.C.A.)

Pursuant to Rule 36(a), Fed. R. of Civ. P., Title 28 U.S.C.A., plaintiff hereby requests defendant, Sydelle Price, to admit the following facts to be true and correct, or to respond hereto before the 14th day of November, 1956; and to admit to the

genuineness of the documents herein listed, and photostatic copies of which are hereto attached.

Facts.

1. In 1946, defendant, Sydelle Price, was copartner, with a 40% copartnership interest, in the Rona Company, a Chicago copartnership.

2. The informational return (Form 1065, filed in the Eastern District of Illinois) for said copartnership for fiscal year ending in calendar year 1946, reported net loss of said copartnership in the sum of $3,303.79.

3. The above-mentioned reported net loss was not a true statement, and required a redetermination and a computation of adjustment.

4. The aforementioned computation of adjustment (which was accepted for the defendant, Sydelle Price, by her husband and copartner, William Price, pursuant to "Acceptance of Revenue Agent's findings by a partnership or fiduciary," which was dated August 18, 1949), of reported net loss, correctly revealed additional net income in the sum of $73,915.70, which was actually income to said copartnership during said fiscal period.

5. Said redetermination and computation of adjustment correctly revealed an actual net profit to said copartnership, for said period, in the sum of $40,049.59.

6. Above mentioned redetermination and computation of adjustment (additional $73,915.70 net

income; $40,049.59 net profit) correctly revealed additional taxable income had been enjoyed by the copartners during the period.

7. Items of said adjustments, correctly allocable as taxable income experienced by defendant, Sydelle Price, during said period (tax liability therefore arising in 1946), are as follows:

(a)	(1)	Ordinary Income	$ 4,244.77
(b)	(2)	Short Term Capital Gain	723.47
(c)	(3)	Other Short Term Capital Gain	21,608.00
(d)		Total	$26,576.24

8. Defendant, Sydelle Price, filed no income tax return for the tax year 1946.

9. The foregoing items of taxable income, therefore, first revealed on the computation of adjustment necessary and in the substitute for income tax return for Sydelle Price (List October 14, 1949; Numbered 519079) resulted, in the regular course of the administration of Statutes for such cases provided, in an assessment on said list of $9,965.48 in taxes, and $1,498.09, an aggregate of $11,463.57, against the defendant.

10. Though the claim stated in Complaint did not accrued within six years of the commencement of this action, an offer in compromise was submitted on June 13, 1950, by taxpayer, on standard Form 656 (Exhibit 1), which was under consideration by the Commissioner of Internal Revenue until June

13, 1951, when it was withdrawn by letter (Exhibit 2).

11. Though statutory notice of deficiency under 26 U.S.C.A. 272(a), 1939, was not issued to defendant, defendant waived restrictions on assessment, issuance and service of statutory letter, pursuant to 26 U.S.C.A. 272(d), 1939, (Exhibit 3).

12. The taxes referred to in paragraphs 10 and 11, above, (being a deficiency of $9,965.48, plus interest in the sum of $1,498.09) were legally assessed on October 14, 1949, (assessment list; Exhibit 4).

13. Defendant paid $1,500 on said assessment on January 12, 1950 (Form 899, Exhibit 5), and there remains due and unpaid $9,963.57, together with interest as by statute provided.

Documents.

Exhibit 1—Offer in Compromise.
Exhibit 2—Letter.
Exhibit 3—Statutory Letter of Deficiency.
Exhibit 4—Assessment List.
Exhibit 5—Form 899.

Dated this 31st day of October, 1956.

JACK D. H. HAYS,
United States Attorney;

/s/ ROBERT S. MURLLESS,
Assistant United States Attorney, Attorneys for Plaintiff.

3.

On August 10, 1946, defendant executed a United States Treasury Form 870 which was received by the Commissioner of Internal Revenue on August 18, 1949. The said United States Treasury Form 870 provided in part as follows:

> "Pursuant to the provisions of Section 272(d) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, the restrictions provided in Section 272(a) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, are hereby waived and consent is given to the assessment and collection of the following deficiency or deficiencies in tax * * * taxable year ended December 31, 1946, income tax in the sum of $9,965.48 * * *"

4.

Subsequently, on October 14, 1949, the Commissioner of Internal Revenue "assessed" against defendant for the taxable year 1946 the sum of $9,965.48 plus interest of $1,498.09 or a total of $11,463.57.

5.

Thereafter, on December 16, 1949, the Commissioner of Internal Revenue issued to defendant a letter commonly known as a ninety day letter asserting "deficiencies" for 1946 in penalties under Sections 291(a) and 293(a) of the Internal Revenue Code of $2,491.37 and $498.27, respectively. No deficiency in income tax for the taxable year of

EXHIBIT 2

201 West Jackson St.,
Phoenix, Arizona,

June 27, 1951.

Internal Revenue Agent in Charge,
417 S. Hill St.,
Los Angeles 13, Calif.

Att: Mr. J. B. McLeod,
Phoenix, Arizona.

Re: Offer in Compromise,
Serial No. IT-18-50,
June 13, 1950.

Dear Sir:

Please accept this letter as my request for withdrawal of the "offer in compromise" referred to above; for additional tax assessment for the year 1946; of Sydelle Price, formally of 39 West Adams St., Phoenix, Arizona.

Yours truly,

/s/ SYDELLE PRICE.

1946 was asserted against defendant in the said ninety day letter.

6.

A statutory notice of deficiency in Federal income tax for the taxable year of 1946 for the income tax involved in this cause has never been issued to defendant by the Commissioner of Internal Revenue.

7.

On January 12, 1950, defendant paid to the Commissioner of Internal Revenue the sum of $1,500.00 for the taxable year of 1946.

8.

The amount of the $11,463.57, referred to in Finding of Fact No. 4 remaining unpaid, after the payment of the $1,500.00, at the time the complaint herein was filed is $9,963.57 which is the amount of the judgment plus interest sought by plaintiff.

Conclusions of Law

1.

Section 272 (a) (1) of the Internal Revenue Code of 1939 authorizes a taxpayer to file a petition with the Board of Tax Appeals (Tax Court of the United States) for a redetermination of the deficiency after receipt of a statutory notice of deficiency from the Commissioner of Internal Revenue. The section further provides that until such notice of deficiency has been mailed to the taxpayer, no assessment of a deficiency and no restraint or proceeding in court for its collection shall be made.

EXHIBIT 3

IT:G:N:CPG

Waiver of Restrictions on Assessment and Collection of Deficiency in Tax

Received: Aug. 18, 1949.

Sydelle Price

Pursuant to the provisions of Section 272(d) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, the restrictions provided in Section 272(a) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, are hereby waived and consent is given to the assessment and collection of the following deficiency or deficiencies in tax:

Taxable year ended December 31, 1945, income tax in the sum of.....	$ 408.38
Taxable year ended December 31, 1946, income tax in the sum of	9,965.48
Amounting to the total sum of.....	$10,373.86

together with interest thereon as provided by law.

Date: 8-10-49.

/s/ SYDELLE PRICE,
(Taxpayer),
39 West Maryland Ave.,
Phoenix, Arizona.

Note—The execution and filing of this waiver at the address shown in the accompanying letter will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under Section 3760 of the Internal Revenue Code, and does not, therefore, preclude the assertion of a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

If this waiver is executed with respect to a year for which a Joint Return of a Husband and Wife was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other.

Where the taxpayer is a corporation, the waiver shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

I hereby certify that the attached photostat is a true copy of that portion of the October 14, 1946, Income Tax assessment list, Chicago, Illinois Collection District, indicating assessment of tax $9,965.48, interest $1,498.09, for the year 1946, Tax against Sydelle Price, 39 W. Maryland Ave., Phoenix, Arizona, on file in this office.

In witness whereof, I have hereunto set my hand and caused the seal of this office to be affixed 15th day of August, 1956, at Chicago, Illinois.

/s/ D. J. LUIPPOLD,
District Director of Internal
Revenue, Chicago Illinois.

EXHIBIT 4-2

Assessment Certificate
Commissioner's Assessment List

ETS
Form 23C-1
Treasury Department
Internal Revenue Service

1st District of Illinois.
Month: October 14.
Year: 1949.

Additional Assessments made by Commissioner:

Personal	$191,849.80
Corporation	246,267.71
Withholding	
Estate and Gift Tax	1,007.71

Attachment:
Authorization to Offset Assessments Form 7986-E
Total Thereof: $7,409.48.

Total Assessments Includes Interest Assessments of $69,365.06 Pertaining to Income Taxes and $83.98 Pertaining to Estate and Gift Taxes.

Total Assessments	$439,125.22

I hereby certify that I have made inquiries, determinations, and assessments of taxes, penalties, etc., of the above classification specified in these lists, and find that the amounts of taxes, penalties, etc., stated as corrected and as specified in the supplementary pages of this list made by me are due from the individuals, firms, and corporations opposite whose names such amounts are placed, and that the amount chargeable to the collector is as above.

Dated at Washington, D. C. Office of Commissioner of Internal Revenue, October 14, 1949.

/s/ GEO. J. SCHOENEMAN,
Commissioner of Internal Revenue.

IT:CL:P-7

Int. Date: 10-17-49. Initialed BSH.

I hereby certify that the attached photostat is a true copy of the Assessment Certificate, Form 23C, certifying Income Taxes assessed on the October 14, 1949, List, Chicago, Illinois Collection District signed by George J. Schoeneman, District Director of Internal Revenue, under date of October 14, 1949, on file in this office.

In witness whereof, I have hereunto set my hand and caused the seal of this office to be affixed this day August 15, 1956, at Chicago, Illinois.

/s/ D. J. LUIPPOLD,
District Director of Internal Revenue.

EXHIBIT 4-3

I hereby certify that the attached photostat is a true copy of that statement of Income Tax Due of October 14, 1949, Bill for $9,965.48, Interest $1,-498.09 for the year of 1946 Tax, Balance due $11,-

463.57, against Sydelle Price, 39 W. Maryland Ave., Phoenix, Arizona, on file in this office.

In witness whereof, I have hereunto set my hand and caused the seal of this office to be affixed this 15th day of August, 1956, at Chicago, Illinois.

/s/ D. J. LUIPPOLD,
District Director of Internal Revenue, Chicago, Illinois.

Statement of Income Tax Due

Form 7658—Revised April, 1948
Treasury Department
Internal Revenue Service

Collector's Copy I

Collector's Paid Stamp: [Blank.]

Notice is hereby given that there has been assessed against you the amount of tax, penalty and interest stated below. Demand is hereby made for the immediate payment of the unpaid balance thereof. If payment is not made within 10 days after date of this notice, the law provides that interest will be added at the rate of 6 percent per annum from the date shown below until paid.

Date: 10-24-49.

To avoid further interest the amount stated on this notice must be paid to Collector of Internal Revenue at ..... within 10 days from date stated above.

Name and Address:
Sydelle Price
39 W Maryland Ave.,
Phoenix, Arizona
10-14-49 519079 1946

Old Balance or Remarks		Assessment	Amount Paid	Balance Due
1040	SUB			
272 D	RAR	$9,965.48		
Int. to	INT	1,498.09		
9-17-49	.....			$11,463.57

To Insure Proper Credit, Return This Form With Remittance

[Title of District Court and Cause.]

RESPONSE TO PLAINTIFF'S REQUEST FOR ADMISSIONS OF FACT AND GENUINENESS OF DOCUMENTS

Defendant, in answer to the plaintiff's request for admissions of fact and genuineness of documents served on the 31st day of October, 1956, says:

Facts

1. The truth of statement No. 1 in the request for admissions is admitted.

2. The truth of statement No. 2 in the request for admissions is admitted.

3. The truth of statement No. 3 in the request for admissions is denied.

4. The truth of statement No. 4 in the request for admissions is denied.

5. Defendant denies the truth of statement No. 5 in the request for admissions. However, defendant admits that a Revenue Agent's report, dated August 22, 1949, alleged that the Rona Company realized a net profit of $40,049.59 for the fiscal year ended August 31, 1946.

6. The truth of statement No. 6 in the request for admissions is denied.

7. The truth of statement No. 7 in the request for admissions is denied.

8. The truth of statement No. 8 in the request for admissions is admitted.

9. The truth of statement No. 9 in the request for admissions is denied. However, defendant ad-

mits that on October 14, 1949, an alleged additional tax of $9,965.48 plus alleged interest of $1,498.09 allegedly due from defendant is found on the Income tax assessment list prepared by the Chicago, Illinois, Collection District of the United States Bureau of Internal Revenue.

10. The truth of statement No. 10 in the request for admissions is denied. However, defendant admits that Exhibit 1 attached to the request for admissions was filed on June 13, 1950, and that Exhibit 2 attached to the request for admissions was filed on June 27, 1951.

11. The truth of statement No. 11 in the request for admissions is denied. However, defendant admits that a statutory notice of deficiency was not issued to defendant, and that Exhibit 3 was filed with the Commissioner of Internal Revenue.

12. The truth of statement No. 12 in the request for admissions is denied.

13. The truth of statement No. 13 in the request for admissions is denied. However, defendant admits that $1,500.00 was paid to the Commissioner of Internal Revenue on January 12, 1950.

Documents

With respect to Exhibits 1 through 3, it is admitted that each is a true and correct copy of documents filed by defendant with the Commissioner of Internal Revenue, but no admission whatsoever is made insofar as the legal effect, or lack of legal effect, of the said exhibits.

Insofar as Exhibits 4 through 5 are concerned, it is admitted that each is a true and correct copy of the documents described in the attesting certificates, but no admission of any kind is made regarding the legality, propriety or regularity of the exhibits or of their legal effect, or lack of it.

/s/ SYDELLE PRICE.

State of Arizona,
County of Maricopa—ss.

Subscribed and sworn to before me this 7th day of November, 1956.

[Seal] /s/ F. A. MILLER,
Notary Public.

My Commission Expires: July 8, 1960.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 7, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY, JANUARY 16, 1957

Honorable Dave W. Ling, United States District Judge, Presiding.

This case is called for trial. Robert S. Murlless, Esq., Assistant United States Attorney, is present for the Government. Lee McLane, Esq., is present for the defendant.

Both sides announce ready for trial.

Counsel for the Government states Government's case to the court.

Government's Case:

Jack C. McLeod is sworn and examined for the Government.

The following Government's Exhibits are admitted in evidence:

1. Waiver of Assessments, etc.
2. Letter and photostat of Portion of Assessment.
3. Offer in compromise and letter of withdrawal from compromise.
4. Offer in compromise and notice of rejection.
5. Letter from Wm. Price, dated 10/30/53.
6. Certification of Assessments.
7. Letter dated Dec. 16, 1949.

The Government rests.

Defendant's Case:

William Price is sworn and examined for the defendant.

The defendant rests.

Both sides rest.

It Is Ordered that the record show this case is submitted on briefs; that plaintiff is allowed 10 days to file opening brief, the defendant 10 days to answer, and plaintiff 10 days to reply.

[Title of District Court and Cause.]

MINUTE ENTRY, MARCH 19, 1957

Honorable Dave W. Ling, United States District Judge, Presiding.

This case having been submitted and by the court taken under advisement.

It Is Ordered that judgment will be entered for the defendant, upon findings to be submitted under the Rules.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been heard by the Court without a jury upon the pleadings, oral testimony and exhibits placed in evidence at the trial, and briefs having been submitted by the parties, this Court makes the following findings of fact and conclusions of law:

Findings of Fact

1.

This is an action seeking judgment from defendant in the sum of $9,963.57 for Federal income taxes and interest thereon allegedly due for the taxable year of 1946.

2.

Defendant is a resident of Phoenix, Arizona.

2.

Since the statutory notice of deficiency required to avoid the above prohibition of Section 272 (a) (1) was not issued to defendant with respect to the income tax sought by plaintiff in this cause, it follows that plaintiff may not obtain a judgment for the $9,963.57 sought in this cause unless defendant's execution of the United States Treasury Form, referred to in Finding of Fact No. 3, operates to relieve the Commissioner of the restrictions set forth in Section 272 (a) (1).

3.

Section 272 (d) of the Internal Revenue Code of 1939 provides that a taxpayer may waive the restrictions imposed by Section 272 (a) on the assessment and collection of the whole or any part "of the deficiency."

4.

When the language of Section 272 (d) was interpreted by the United States Court of Appeals for the Ninth Circuit, it was held that a waiver filed before a deficiency has been determined is premature and powerless to prevent the Commissioner's resort to a letter of deficiency. Mutual Lumber Co. v. Poe, 66 F. 2d 904 (C.A. 9th, 1933), cert. den., 290 U. S. 706. In short, a waiver or consent filed before the Commissioner has sent a notice of deficiency is premature and invalid. McCarthy v. Commissioner, 80 F. 2d 618 (C.A. 9th, 1935), cert. den., 296 U. S. 655; East Bay Water Co. v. McLaughlin, 24 F.

Supp. 222, (1938), Government's appeal to C.A. 9th dismissed on stipulation, 104 F. 2d 1016.

Nor are the above courts alone in the view that waivers of the restrictions established by Section 272 (a) (1) of the Internal Revenue Code of 1939 which are executed before the issuance of a statutory notice of deficiency are premature and invalid. Such an interpretation finds solid support in the legislative history of Section 27. For example, in discussing Section 274 (d) of the Internal Revenue Bill of 1926 (Section 272 (d) of the Internal Revenue Code of 1939) the Senate Finance Committee report, the text of which is found in Sen. Rep. No. 52, 69th Cong., 1st Sess. (1926) reprinted in 1939-1 Cum. Bull., Part 2, at 352, stated:

> "The law provides that where a deficiency is assessed there shall be assessed at the same time interest at the rate of 6 per cent from the time the deficiency should have been paid to the date of assessment. In order to permit the taxpayer to pay the tax and stop the running of interest, the committee recommends in Section 274 (d) of the bill that the taxpayer at any time be permitted to waive in writing the restrictions on the Commissioner against assessing and collecting the tax, *but without taking away the right of the taxpayer to take the case to the Board* * * *" (Italics supplied.)

Since Section 274 (a) of the Internal Revenue Bill of 1926 which became Section 272 (a) of the Internal Revenue Code of 1939, provides that a tax-

payer cannot go to the Board of Tax Appeals (Tax Court of the United States, until there has been issued a notice of deficiency, it is clear that it was intended that the waiver subsection 272 (d) only applies after a notice of deficiency has been issued. This is the only conclusion possible in view of the above language that the waiver subsection 274 (d) does not take away the right of the taxpayer to take his case to the Board.

Subsequent legislative history is equally convincing that the view adopted by the United States Court of Appeals for the Ninth Circuit is correct. Thus, in 1938 a subcommittee of the Ways and Means Committee of the House of Representatives on January 14, 1938, made the following statements:

> "As a result of two decisions of the Circuit Court of Appeals for the Ninth Circuit (Mutual Lumber Co. v. Poe, 66 F. 2d 906, certiorari denied Jan. 6, 1936; McCarthy v. Commissioner, 80 F. 2d 618, certiorari denied April 6, 1936), *a valid waiver cannot be given* by a taxpayer *prior to the formal determination* by the Commissioner, *as evidenced by a* 60 or *90 day letter that there is a deficiency in tax.*" (Italics supplied.)

Accordingly, the subcommittee recommended an amendment,

> "* * * to insure the validity of waivers given before the mailing of the deficiency letter providing that the taxpayer shall have the right,

> at any time after a deficiency is proposed in any manner that the Commissioner may direct, *whether before or after the sending of the notice of deficiency*, as provided in subsection (a), to waive by a signed notice in writing, any and all restrictions or conditions however imposed on the immediate assessment and collection of the whole or any part of the deficiency so proposed." (Italics supplied.)

However, the proposed amendment did not become a part of the law. In fact, no change in Section 272 (d) occurred until the Internal Revenue Code of 1954 adopted the recommendation which had been made by the Ways and Means subcommittee in 1938. Thus, Section 6213 (d) of the Internal Revenue Code of 1954; the successor of Section 272 (d) of the Internal Revenue Code of 1939, reads as follows:

> "Waiver of Restrictions—The taxpayer shall at any time *(whether or not a notice of deficiency has been issued)* have the right, by a signed notice in writing filed with the Secretary or his delegate, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency." (Italics supplied.)

Certainly the addition of the phrase "whether or not a notice of deficiency has been issued" to Section 6213 (d) clearly reflects the belief of Congress that the law was otherwise prior to the passage of the Internal Revenue Code of 1954.

5.

Consequently, since the law as announced by the United States Court of Appeals for the Ninth Circuit holds a waiver filed prior to the determination of an assessment by the Commissioner to be premature and invalid, it follows that the Commissioner was not relieved of the restrictions set forth in Section 272 (a) (1) because defendant executed a United States Treasury Form 870 purporting to waive, pursuant to Section 272 (d), those restrictions.

6.

By virtue of the prohibition contained in Section 272 (a) of the Internal Revenue Code of 1939, prohibiting any assessment or proceeding in court for the collection of income tax provided for in Chapter I of the Internal Revenue Code of 1939, plaintiff is not entitled to judgment.

Judgment will be entered for the defendant in accordance with the above findings.

Dated this 10th day of April, 1957.

/s/ DAVE W. LING,
U. S. District Judge.

Receipt of Copy acknowledged.

Proposed Findings, Etc.: [Endorsed]: Filed March 25, 1957.

Findings, Etc.: [Endorsed]: Filed April 10, 1957.

United States District Court for the
District of Arizona

Civil Action, File Number 2441-Phx.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SYDELLE PRICE,
Defendant.

JUDGMENT

This cause came on for trial before the Court without a jury on January 16, 1956, and the Court having directed judgment for defendant, it is hereby

Ordered, Adjudged and Decreed that plaintiff take nothing and that this action be dismissed on the merits, and that defendant recover from plaintiff his costs in this action.

Dated this 19th day of April, 1957.

/s/ DAVE W. LING,
United States District Judge,
for the District of Arizona.

The attached judgment is hereby approved as to form only.

JACK D. H. HAYS,
United States Attorney,
Attorney for Defendant:

By /s/ ROBERT S. MURLLESS.

Lodged April 16th, 1957.

[Endorsed]: Filed April 19, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from that final judgment entered on the 19th day of April, 1957, which was pursuant to findings of fact and conclusions of law entered on the 10th day of April, 1957.

Dated this 15th day of May, 1957.

/s/ JACK D. H. HAYS,
United States Attorney,
Attorney for Plaintiff.

[Endorsed]: Filed May 15, 1957.

[Title of District Court and Cause.]

MOTION AND ORDER FOR EXTENSION OF TIME WITHIN WHICH TO DESIGNATE THE RECORD AND DOCKET APPEAL

Comes now the United States of America, plaintiff, and moves the Court for an extension of time within which to designate the record and docket its appeal herein in the United States Court of Appeals for the Ninth Circuit to on or before the 13th day of August, 1957.

Dated this 21st day of June, 1957.

/s/ JACK D. H. HAYS,
United States Attorney,
Attorney for Plaintiff.

Order

Pursuant to motion under Rule 73(g) of the Rules of Civil Procedure, it is hereby

Ordered that the plaintiff, United States of America, may have to and until August 13, 1957, within which to designate the record, file the record on appeal and docket the appeal herein in the United States Court of Appeals for the Ninth Circuit.

Dated this 21st day of June, 1957.

/s/ DAVE W. LING,
Judge, United States District Court for the District of Arizona.

[Endorsed]: Filed June 21, 1957.

[Title of District Court and Cause.]

STIPULATION

It is stipulated and agreed by the parties pursuant to Rule 75(h), Federal Rules of Civil Procedure, that the record on appeal shall include the following portion of the record previously omitted by error or accident:

The Reporter's Transcript of Proceedings.

Dated this 20th day of September, 1957.

SYDELLE PRICE.
McLANE AND McLANE,

By /s/ W. LEE McLANE, JR.,
Attorneys for Defendant.

JACK D. H. HAYS,
United States Attorney;

/s/ RALPH G. SMITH, JR.,
Assistant United States Attorney, Attorneys for Plaintiff.

[Endorsed]: Filed September 20, 1957.

In the United States District Court
for the District of Arizona

No. 2441

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SYDELLE PRICE,

Defendant.

PROCEEDINGS

Proceedings Had and Evidence Taken in the above-entitled cause before the Honorable Dave W. Ling, Judge of said court, in his courtroom in the United States Courthouse, at Phoenix, Arizona, on

Wednesday, the 16th day of January, A.D. 1957, at ten o'clock a.m.

Present:

JACK D. H. HAYS,
United States Attorney, By
ROBERT S. MURLLESS,
Asst. United States Attorney,
Appeared for the Plaintiff.

McLANE & McLANE, By
W. LEE McLANE, JR., and
NOLA McLANE,
Appeared for the Defendant.

The Clerk: Civil Number 2441 Phoenix. United States of America, plaintiff, versus Sydelle Price, defendant. For trial.

Mr. Murlless: Plaintiff is ready.

Mr. McLane: Defendant is ready, your Honor.

The Court: You may proceed.

Mr. Murlless: If the Court please. Counsel.

Preliminarily, if I might give some of the background of the case, and that which is proposed to be proved.

This case is an allegation for an assertion of an endeavor to render to judgment a claim for deficiency in taxes against one Sydelle Price.

Mrs. William Price failed to file a return in 1946. Preliminarily, however, the case was commenced by a joint Intelligence and Internal Revenue agent investigation of the income tax returns of the Rona Company, a copartnership, in 1946,

and, incidentally, the records of what was known as Rona Enterprises, which the company or copartnership succeeded about the first of January, 1945.

Disclosed in this investigation was the fact that large insurance premiums had been paid upon the life insurance policies of Rona Company, on the lives of the copartners, and the cost taken as expense, and deducted. There was conducted quite an investigation of that, which resulted in [2*] 1949 of a proposed additional income to the copartnership, with proposed deficiencies of tax due on an allocation basis from the copartners.

At this time about $20,000 was determined to be the proposed deficiency with respect to the income of the William Price interest.

At this time Mr. Price came up with the assertion that his wife was in reality the principal person interested in the income from the copartnership, the Price family's income from the Rona copartnership. He said to a degree of 80 per cent. And this is the origin of the assertion really against Sydelle Price, Mrs. Price, Mrs. William Price, of a tax deficiency for 1946.

In connection with this, and immediately after he had asserted that his wife really was the big receiver of income from Rona Company in 1946, it was proposed that against both William and his wife, Sydelle, there would be assessment of penalties for failure to file as against her, and negligence

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

penalties in connection with the proposed deficiencies for the years 1945 and 1946.

To this, the assertion of these penalties, the Price family, both of them, objected, protested. But they had no protest with respect to the assertion of the proposed deficiency of tax as to either of them.

Subsequently, and the nature of this lawsuit indicates [3] this, Mr. Price of course paid the deficiency with respect to him that had been established for 1945 and 1946. To the contrary, Mrs. Price, who about that time was characterized as a person without property.

He paid all his off. Hers still remains unpaid.

Now, in connection with the proposed deficiency and the protest with respect to the penalties for 1945 and 1946, both of the taxpayers executed a waiver of restrictions on the assessment and collection of these proposed deficiencies of tax. And it was assessed in October of 1949.

In the meantime, they took the proposed penalties that were proposed as to be assessed for 1945 and 1946, to the Tax Court, upon protest. They protested them and took them to the Tax Court.

Then several claims were filed for alleged overassessment, overpayment with respect to this proposed deficiency as to 1945 and 1946, particularly by Mrs. Price. Then offers in compromise were submitted, particularly by Mrs. Price, but by both of them, as I recall. Maybe not. Maybe it was after he had paid his tax.

Then the Tax Court matter was concluded where

protest had been made and litigation was undertaken of the negligence penalties.

In addition to the tax deficiency that is in [4] litigation here, there were negligence penalties that were litigated to the Tax Court.

The tax court litigation was concluded upon the stipulation of the Government that they would withdraw from their position that negligence penalties should be assessed; upon the basis of the collateral agreement by each of these taxpayers in the Tax Court that they would make no more claims, they would agree to the rejection of the claims, particularly by Mrs. Price, that had been made for refund, that they would make no further claim; and that at the Commissioner's request they would enter into a final closing agreement, particularly Mrs. Price would enter into a final closing agreement on the basis of the tax deficiency that is alleged in this complaint.

And on that basis, the Government did stipulate and the Tax Court decision did go pursuant to that stipulation, that the Government had withdrawn from its position that the negligence penalties should be assessed. and the Tax Court case was closed on that basis.

It is on this basis—this is the background and the sources from which the evidence comes which we assert reflect that Sydelle Price owes a tax liability of some $9,000, together with interest of some $1,500, for the tax year 1946.

The Court: All right. [5]

Mr. Murlless: Mr. McLeod, if your Honor please.

JACK B. McLEOD

called as a witness for the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Murlless:

Q. Will you state your name, please?

A. Jack B. McLeod.

Q. And what is your work, Mr. McLeod?

A. I am with the Internal Revenue Service.

Q. And for how long has that been your work?

A. About ten years.

Q. And is it now, in connection with the Phoenix office of the Director of Internal Revenue?

A. Yes.

Q. And do you come to the Court today in connection with the case, United States of America, versus Sydelle Price, as the custodian of certain of the official records and documents of the Internal Revenue Service? A. Yes.

Q. And I hand you Number 1. In general, what is it?

The Court: Better have it marked for identification.

The Clerk: Government's Exhibit 1 for identification. [6]

(Said Waiver of Assessment was marked as Government's Exhibit 1 for identification.)

Q. (By Mr. Murlless): I hand you Government's Exhibit 1 for identification, Mr. McLeod, and ask you what that is?

(Testimony of Jack B. McLeod.)

A. Well, this is a Waiver of Restriction on Assessment and Collection of Deficiency and Tax. That's the title of the form.

Q. And with respect to what taxpayer, or what person does it appear to be effective or operative?

A. Sydelle Price.

Q. Do you know Mrs. Price, or Sydelle Price?

A. No.

Q. Did you ever see her? A. No.

Q. Do you know the defendant Sydelle Price's husband, Mr. William Price? A. Yes.

Q. Is he in court? A. Yes.

Q. In that connection did you have occasion to work the claims in the administrative procedure of the tax assessments, and claims of both Mrs. Sydelle Price and Mr. William Price? A. Yes. [7]

Q. With whom did you deal in connection with Mrs. Sydelle Price's claims, or the administrative procedure to determine a deficiency of tax?

A. Mr. Price.

Q. Always with Mr. Price? A. Yes.

Q. Who signed the documents?

A. Well, which document do you mean?

Q. Well, do you know Mr. Price's signature when put side by side, with Mrs. Price's?

A. I believe so.

Q. In the regular course, you have seen signatures that were represented by Mr. Price to have been signed by Mrs. Price? A. Yes.

Q. And by Mr. Price to have been signed by himself? A. Yes.

(Testimony of Jack B. McLeod.)

Q. Now, is this one of the documents that appears to have been signed by Sydelle Price?

A. Yes.

Q. And it is a Waiver of Restrictions, is it not?

A. Yes.

Q. What is its date? A. August 10, 1949.

Q. And does it purport to be a Waiver of Restrictions [8] on a particular amount of deficiency of tax? A. Yes.

Q. And what is that amount?

A. For the tax year 1945, it is $408.38. For the tax year 1946, it is $9,965.48.

Mr. Murlless: I move for the admission in evidence of Government's Exhibit 1 for identification.

Mr. McLane: No objection.

The Court: It may be received.

(Said Waiver was received in evidence and marked as Government's Exhibit 1.)

Mr. Murlless: May this be marked for identification, if your Honor please.

The Clerk: Government's Exhibit 2 for identification.

(Said Letter and Photostat of Portion of Assessment List was marked as Government's Exhibit 2 for identification.)

Mr. Murlless: I move for admission in evidence of Government's Exhibit 2 for identification, which is qualified under the rule, I think counsel will find.

(Testimony of Jack B. McLeod.)

Mr. McLane: No objection.

The Court: It may be received.

(Said Letter and Photostat were received in evidence and marked as Government's Exhibit 2.) [9]

Q. (By Mr. Murlless): I hand you Government's Exhibit 2 in evidence, Mr. McLeod, and ask you what is that?

A. This is an Assessment List form showing the assessment against Sydelle Price.

Q. And in what sum is the assessment of tax itself?

A. It is for the year 1946, in the amount of $9,965.48.

Q. Is that the precise amount involved?

A. Yes.

Q. In Government's Exhibit 1 for identification?

A. Yes.

Q. And does the Assessment List, Government's Exhibit 2, show when the assessment was made?

A. October 14th, 1949.

Mr. Murlless: May this document be marked for identification, if your Honor please.

The Clerk: Government's Exhibit 3 for identification.

(Said Offer in Compromise and Letter of Withdrawal was marked as Government's Exhibit 3 for identification.)

Q. (By Mr. Murlless): I hand you Government's Exhibit 3 for identification, Mr. McLeod,

(Testimony of Jack B. McLeod.)

and ask you if that is also a document that was in your custody in connection with the files relative to Mrs. Sydelle Price?

A. Yes; this is an Offer in Compromise [10] form.

Q. An official document of the Internal Revenue Service? A. Yes.

Q. And in your custody in connection with this case? A. Yes.

Q. And what is its date?

A. It was dated June 1st, 1950, and received June 13th, 1950, in the office of the Collector of Internal Revenue.

Mr. Murlless: I move for the admission in evidence of Government's Exhibit 3 for identification.

Mr. McLane: No objection.

The Court: It may be received.

(Said document was received in evidence and marked as Government's Exhibit 3.)

Q. (By Mr. Murlless): To what account, if you can tell, does Exhibit 3 in evidence relate?

A. It relates to 1946 income tax liability of Sydelle Price. The total liability shown here is $11,463.57, which probably includes interest.

Q. Does it show the amount of tax alone?

A. No.

Q. Look at the face of it, Mr. McLeod, and see if it does not reflect the amount of tax, and the account to which it is effective? [11]

A. It states the additional tax for 1946 of $9,956.48.

(Testimony of Jack B. McLeod.)

Q. Does that sum you just read compare with the amount stated in Government's Exhibit 1 in evidence?

A. It seems to be somewhat—it seems to be a little bit different.

Q. What is the difference?

A. Nine dollars, apparently. $9,965.48, as compared with $9,956.48.

Q. Government's Exhibit 3 in evidence was submitted, or received by the Internal Revenue Service on June 13, 1950, was it not, Mr. McLeod?

A. Yes.

Q. Can you state that it does relate to the tax deficiency, or the tax assessment which is related in Government's Exhibit 2 in evidence?

A. Yes, it relates to that. The exhibit is related.

Q. To the same tax assessment? A. Yes.

Q. And to the same account? A. Yes.

Q. Will you state to the Court how you know that?

A. The account number relating to the original document, the return, is the same on the offer as well as on the assessment list.

Q. Where is that document? [12]

A. That is 519079; and 519079.

Q. Very well. Now, in connection with Government's Exhibit 3 in evidence, I will hand you another document, and ask you if you know what that is, if you will state generally what that is?

A. This is a written withdrawal of the Offer

(Testimony of Jack B. McLeod.)

in Compromise which is Exhibit 3, signed by Sydelle Price.

Mr. Murlless: If your Honor please, might Plaintiff's Exhibit 3 be supplemented by the Letter of Withdrawal which Mr. McLeod has just testified to, as being a part and parcel of the same exhibit? That is, it is a withdrawal of the Offer in Compromise.

Mr. McLane: No objection.

The Court: Oh, yes. It is attached to the Request for Admissions. I guess it is the same.

Mr. Murlless: Yes, sir.

Q. (By Mr. Murlless): This letter of Withdrawal relates to the Offer of Compromise which is Exhibit 3? Did I understand you to state that, Mr. McLeod? A. Yes.

Mr. Murlless: May this be marked for identification, if your Honor please?

The Clerk: Government's Exhibit 4 for identification.

(Said Offer in Compromise and Notice of Rejection was marked as Government's Exhibit 4 for identification.) [13]

Q. (By Mr. Murlless): I hand you Government's Exhibit 4 for identification, and ask you if this is also a document in your custody as custodian of the documents relating to Mrs. Sydelle Price, and an official document of the Internal Revenue Service? A. Yes.

Q. And what is it?

(Testimony of Jack B. McLeod.)

A. It is another Offer in Compromise submitted with respect to the original liability of Mrs. Price.

Q. Account number what, if it shows?

A. I beg your pardon?

Q. Does it state the account number to which it was an offer in compromise? Perhaps on the back there.

A. It states the account. Yes, it states the account—rather, assessment number here, account number.

Q. And what is that? Is it 590029, Mr. McLeod?

A. The number 590029. Or, pardon me, 590031, is the same on both Offers, but it refers to this account here, rather than the Return. It is another number.

Q. Very well, sir. Now, I hand you a document, and ask you in general what that is?

A. This is a Notice of Rejection of the Offer in Compromise, this Offer here, signed by the District Director.

Q. That is, when you speak of this Offer here, that is the second one, Government's Exhibit 4 for identification? [14]

A. Yes, the second offer.

Mr. Murlless: I move for the admission in evidence, if your Honor please, of Government's Exhibit 4 for identification, and move that this document, the letter to which Mr. McLeod has just testified, being a Notice of Rejection, be appended to Government's Exhibit 4, all in one exhibit.

Mr. McLane: No objection.

(Testimony of Jack B. McLeod.)

The Court: It may be received.

The Clerk: Government's Exhibit 4 in evidence.

(Said documents were received in evidence and marked as Government's Exhibit 4.)

Mr. Murlless: May this document be marked for identification, if your Honor please.

The Clerk: Government's Exhibit 5 for identification.

(Said Letter dated 10/30/53 was marked as Government's Exhibit 5 for identification.)

Q. (By Mr. Murlless): I hand you Government's Exhibit 5 for identification, Mr. McLeod, and ask you what that is?

A. This is a statement by William Price, dated October 30, 1953, in which he requests that his name be deleted from the Offer in Compromise, the second Offer in Compromise.

Q. It is a letter from William Price to the Internal [15] Revenue Service?

A. Yes, directed to myself.

Q. As part of the official documents of the Internal Revenue Service in your custody in connection with this case? A. Yes.

Q. Directed, as you say, to yourself?

A. Yes.

Mr. Murlless: I move for the admission in evidence of Government's Exhibit 5.

Mr. McLane: No objection.

The Court: It may be received.

(Testimony of Jack B. McLeod.)

(Said Letter was received in evidence and marked as Government's Exhibit 5.)

Q. (By Mr. Murlless): Have you caused the accounts of Sydelle Price in the Internal Revenue Service in the Phoenix office to be examined to determine what the current balance due under the proposed deficiency and the claim of the United States in this case is? A. Yes.

Mr. Murlless: May this be marked for identification, if your Honor please.

The Clerk: Government's Exhibit 6 for identification.

(Said Certification of Assessments was marked as Government's Exhibit 6 for identification.) [16]

Q. (By Mr. Murlless): I hand you a document marked Government's Exhibit 6 for identification, and ask you what that is?

A. This is a Certification by the responsible officer of the balance due on Sydelle Price on the 1946 tax liability.

Q. Is there a date on the exhibit?

A. Dated January 15, 1951.

Mr. Murlless: I move for the admission in evidence of Government's Exhibit 6 for identification.

Mr. McLane: No objection, your Honor.

The Court: It may be received.

(Said Certification was received in evidence and marked as Government's Exhibit 6.)

Mr. Murlless: Thank you very much, Mr. McLeod. Your witness.

Mr. McLane: No questions.

(Witness excused.)

Mr. Murlless: The Plaintiff rests, if your Honor please.

The Court: All right.

Mr. McLane: Your Honor, I don't believe it will be necessary to put any evidence on for the defendant, if we can have an agreement or understanding, if counsel desires, that in this case, with respect to this particular defendant, there was no statutory notice of deficiency issued to that [17] defendant with respect to the taxable year 1946, insofar as the liability proposed in this case is concerned.

If that can be stipulated and agreed to, it won't be necessary for me to put a witness on.

The Court: Do you agree to that?

Mr. Murlless: No, sir, we can't agree to that.

The Court: All right, that settles that.

Mr. McLane: Mr. Price, please.

WILLIAM PRICE

called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McLane:

Q. Will you state your name, please?

A. William Price.

(Testimony of William Price.)

Q. Would you please state for the record your relationship with Sydelle Price?

A. I am her husband.

Q. During the course of an audit and examination of Mrs. Price's 1956 Federal Income tax liability, did you in her behalf conduct negotiations with the Treasury Department concerning her liability? A. I believe you mean 1946?

Q. 1946, yes. [18] A. Yes, I did.

Q. During any period up to and including today, have you ever received from the Treasury Department or the Government a letter which was entitled at the top of the letter, "90-D," "90 day," which read as follows:

"Dear Mrs. Doe: You are advised that the determination of your income tax liability for the taxable year ended December 31, 1946, discloses a deficiency or deficiencies, a deficiency of 'X' dollars, as shown in the statement attached.

"In accordance with the provisions of existing Internal Revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

"Within 90 days from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States at its principal address, Washington 4, D. C., for a redetermination of the deficiency or deficiencies.

"In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day.

(Testimony of William Price.)

Otherwise, Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

"Should you not desire to file a petition, you [19] are requested to execute the enclosed form and forward it to the District Director of Internal Revenue, Phoenix, Arizona. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after the receipt of the form, or on the date of assessment, or on the date of payment, whichever is earliest.

"Very truly yours. So and so (unknown name), Commissioner, by another signature, District Director of Internal Revenue."

Have you ever received a letter containing those statements?

Mr. Murlless: I am not sure that question is relevant. I object, unless he says whether or not his wife received it.

Q. (By Mr. McLane): Have you ever received on behalf of your wife, or has your wife, to your knowledge, ever received a letter with these statements in it?

A. I have not received one on her behalf, nor do I know of any she has received.

Q. During the course of this audit, have you examined and reviewed all documents received by Mrs. Price? [20] A. Yes, I have.

Mr. McLane: No further questions, your Honor.

(Testimony of William Price.)

Mr. Murlless: It may take just a few minutes to find the document with respect to which I would like to start examination of Mr. Price.

The Court: All right.

Mr. Murlless: We were unable to find it here.

The Court: Maybe it isn't there.

Mr. Murlless: Well, it may be, your Honor. I will go ahead without it.

Cross-Examination

By Mr. Murlless:

Q. It is your recollection, is it not, Mr. Price, that you did not seek to litigate certain penalties that had been proposed for the tax year 1945, in relation to your wife's proposed deficiency and her failure to file a return for 1946?

Mr. McLane: I object to the question as not being within the scope of cross-examination.

The Court: Call him as your witness, then. It is probably true.

Mr. Murlless: No, sir.

The Court: You can prove that by somebody else. This witness was only asked one question. [21]

Mr. Murlless: Very well, your Honor.

May this be marked for identification as Government's Exhibit 7.

The Clerk: Government's Exhibit 7 for identification.

(Said Letter dated December 16, 1949, was marked as Government's Exhibit 7 for identification.)

(Testimony of William Price.)

Q. (By Mr. Murlless): I hand you Government's Exhibit 7 for identification, and ask you if you have ever seen that before?

Did you state you received everything for your wife, Mrs. Sydelle Price?

A. Yes, I stated I received everything for her.

Q. Did you ever see that before?

A. It is probable. I can't be too certain.

Q. On the second page, does it refer to the tax assessment, deficiency assessment against her for 1946, in the sum of $9,965.48?

A. Yes, it does. But on the first page it refers to a deficiency and penalties only.

Q. Yes, the first page, it really is a 90-day letter with respect to the protest you filed with respect to the penalties for her for 1946?

A. That is right.

Q. But it relates and reflects the tax liability that [22] is involved in this claim, doesn't it?

Mr. McLane: I object to the form of the question. That is a conclusion of law.

The Court: The document will speak for itself.

Mr. Murlless: Very well. I move for the admission in evidence of Government's Exhibit 7.

Mr. McLane: No objection.

The Court: It may be received.

The Clerk: Government's Exhibit 7 in evidence.

(Said Letter of December 16, 1949, was received in evidence and marked as Government's Exhibit 7.)

Mr. Murlless: I have no further questions.

Mr. McLane: No further questions, your Honor.

The Court: That is all.

(Witness excused.)

Mr. McLane: The defendant has no further evidence to offer, your Honor, and respectfully requests that the Court reserve decision, and give defendant the opportunity to submit a short brief which we have prepared and will have in to you this afternoon.

The Court: All right.

Mr. Murlless: The Plaintiff moves for judgment, if your Honor please, and is prepared to submit the case.

The Court: All right. Do you want to answer that memorandum? [23]

Mr. Murlless: Yes, sir.

The Court: All right. Your memorandum will be in this afternoon?

Mr. McLane: Yes, sir.

The Court: What time do you want to reply to it?

Mr. Murlless: I don't know what he has in mind.

The Court: I don't either.

Mr. Murlless: Well, I think it can probably be answered tomorrow.

The Court: You are optimistic. Then you want time to reply to his?

Mr. McLane: Yes, sir. I would like ten days.

The Court: I will give you each ten days.

The Court will stand at recess.

(Which was all of the proceedings had on the hearing of the above-entitled cause.) [24]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the District of Arizona.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Phoenix, Arizona, this 13th of September, A.D. 1957.

/s/ JANE HORSWELL,
Official Reporter.

[Endorsed]: Filed September 20, 1957.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the

records and files of said Court, including the records and files in the case of United States of America, Plaintiff, versus Sydelle Price, Defendant, numbered Civ-2441 Phoenix, on the docket of said Court.

I further certify that the attached original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached copies of minute entries are true and correct copies of the originals thereof remaining in my office in the City of Phoenix, State and District aforesaid.

I further certify that the said documents, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated, and the same are as follows, to wit:

1. Complaint.
2. Answer.
3. Plaintiff's Request for Admissions.
4. Defendant's Response to Request for Admissions.
5. Minute entry of January 16, 1957 (proceedings of trial).
6. Minute entry of March 19, 1957 (order for judgment).
7. Findings of Fact and Conclusions of Law.
8. Judgment, filed and docketed April 19, 1957.
9. Notice of Appeal.
10. Order Extending Time to Designate Record and Docket Appeal.
11. Designation of Contents of Record on Appeal.

I further certify that the following original exhibits are transmitted herewith as a part of this record on appeal, as designated, to wit:

Government's exhibits 1, 2, 3, 4, 5, 6 and 7, in evidence.

Witness my hand and the seal of said Court this 9th day of August, 1957.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, and keeper of the seal thereof, do hereby certify that the annexed and foregoing documents are the originals of Stipulation, Motion and Order Including Reporter's Transcript of Proceedings in the Record on Appeal, and Reporter's Transcript of Proceedings, filed in case No. Civ-2441 Phoenix, United States of America, Plaintiff, vs. Sydelle Price, Defendant. Said documents are certified as a part of the record on appeal in said case.

Witness my hand and the seal of said Court at Phoenix, Arizona, this 24th day of September, 1957.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 15662. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Sydelle Price, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed August 12, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15662

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

SYDELLE PRICE,

Defendant-Appellee.

APPELLANT'S STATEMENT OF POINTS

Comes now appellant, the United States of America, and cites the following points upon which it intends to rely for reversal of the judgment of the District Court:

1. The District Court erred in holding that the Waiver of Restrictions on Assessment and Collection of Deficiency in Tax (Treasury Department Form 870) for the years 1945 and 1946 executed by taxpayer on August 10, 1949, was invalid because it was executed prior to the issuance of a statutory notice of deficiency for the taxable years.

2. The District Court erred in not holding that the Waiver of Restrictions on Assessment and Collection of Deficiency in Tax (Treasury Department Form 870) for the years 1945 and 1946 executed by taxpayer on August 10, 1949, was valid and effectively waived the conditions precedent to assessment

of the taxes due provided in Section 272(a) of the Internal Revenue Code of 1939.

3. The District Court erred in not holding that the assessment of tax due for the year 1946 made by the Commissioner of Internal Revenue on October 14, 1949, was valid.

4. The District Court erred in entering judgment for the defendant.

5. The District Court erred in not entering judgment for the plaintiff, the United States of America.

/s/ JACK D. H. HAYS,
United States Attorney.

[Endorsed]: Filed August 12, 1957.

63 In United States Court of Appeals for the Ninth Circuit

Before STEPHENS, Chief Judge; DENMAN and ORR, Circuit Judges

Minute entry of order of submission

April 11, 1958

Ordered appeal herein argued by Mr. Thomas N. Chambers, Attorney, Department of Justice, counsel for the Appellant, and by Mr. W. Lee McLane, Jr., counsel for the Appellee, and submitted to the Court for consideration and decision.

64 In United States Court of Appeals for the Ninth Circuit

No. 15662

UNITED STATES OF AMERICA, APPELLANT

v.

SYDELLE PRICE, APPELLEE

Before STEPHENS, Chief Judge; DENMAN and ORR, Circuit Judges

Order setting aside the submission of the case, etc.

Filed July 14, 1958

It appearing that the judges of the panel to which the case is assigned for consideration and decision are of the opinion that the cause should be considered and decided by the Court en banc,

It is hereby ordered that the submission of the case be and hereby is set aside and the case returned to the Court en banc.

(S) ALBERT LEE STEPHENS,
Chief Judge.

(S) WILLIAM DENMAN,
Circuit Judge.

(S) WM. E. ORR,
Circuit Judge.

[File endorsement omitted.]

In accordance with the above, the cause is hereby assigned to the Court en banc for hearing.

(S) RICHARD H. CHAMBERS,
Circuit Judge.

(S) STANLEY N. BARNES,
Circuit Judge.

(S) FREDERICK G. HAMLEY,
Circuit Judge.

(S) OLIVER D. HAMLIN,
Circuit Judge.

(S) ALBERT LEE STEPHENS,
Chief Judge.

(S) WILLIAM HEALY,
Circuit Judge.

(S) WALTER L. POPE,
Circuit Judge.

(S) JAMES ALGER FEE,
Circuit Judge.

65 In United States Court of Appeals for the Ninth Circuit

Before STEPHENS, Chief Judge, and HEALY, POPE, FEE, CHAMBERS, BARNES, HAMLEY, HAMLIN and JERTBERG, Circuit Judges

Minute entry of order of submission

October 13, 1958

Ordered appeal herein reargued by Mr. John Justin Pajak, Attorney, Department of Justice, counsel for the Appellant, and by Mrs. Nola McLane, counsel for the Appellee, and submitted to the Court for consideration and decision.

66 In United States Court of Appeals for the Ninth Circuit

Before STEPHENS, Chief Judge, and HEALY, POPE, FEE, CHAMBERS, BARNES, HAMLEY, HAMLIN, and JERTBERG, Circuit Judges

Minute entry of order directing filing of opinion and filing and recording of judgment

January 2, 1959

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

67 In United States Court of Appeals for the Ninth Circuit

No. 15662

UNITED STATES OF AMERICA, APPELLANT

v.

SYDELLE PRICE, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Opinion

January 2, 1959

Before STEPHENS, Chief Judge, and HEALY, POPE, FEE, CHAMBERS, BARNES, HAMLEY, HAMLIN, and JERTBERG, Circuit Judges

HAMLEY, Circuit Judge:

The United States brought this action against Sydelle Price to collect an asserted unpaid balance of federal income taxes. One of Mrs. Price's defenses was that since no notice of deficiency had been issued the suit was prohibited by statute. The government contended that Mrs. Price had waived this requirement. It was her position, however, that this require-

ment may not be waived, and that her purported waiver was therefore ineffective for this purpose.

The trial court adopted defendant's view, and entered judgment dismissing the action. The government appeals. The only question here presented is whether the statutory requirement that the Commissioner of Internal Revenue mail a notice of deficiency to the taxpayer as a condition precedent to the bringing of such an action had been effectively waived.

The facts to be considered in deciding this question are not in dispute and may be briefly stated. On August 10, 1946, Mrs. Price executed United States Treasury Form 870, which
68 was received by the commissioner on August 18, 1949. In so far as here relevant, the form reads as follows:

"Sydelle Price

"Pursuant to the provisions of Section 272(d) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, the restrictions provided in Section 272(a) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, are hereby waived and consent is given to the assessment and collection of the following deficiency or deficiencies in tax:

* * * * *

"Taxable year ended December 31, 1946, income tax in the sum of..... $9,965.48

* * * * *

On October 14, 1949, the commissioner assessed against Mrs. Price, for the taxable year 1946, the sum of $9,965.48 plus interest of $1,498.09, or a total of $11,463.57. On December 16, 1949, the commissioner issued to her a so-called "ninety-day letter" asserting deficiencies for 1946. The deficiencies referred to in this letter were for penalties under §§ 291(a) and 293(a) of the Internal Revenue Code of 1939, in the amounts of $2,491.37 and $498.27, respectively.[1] No deficiency in income tax for the taxable year of 1946 was asserted against the taxpayer in this letter, nor has any other notice of deficiency concerning that year been mailed to her.

On January 12, 1950, Mrs. Price paid to the commissioner the sum of $1,500 for the taxable year of 1946. Of the amount assessed for the year 1946, as noted above, there then remained

[1] All statutory references in this opinion are to the Internal Revenue Code of 1939, unless otherwise indicated.

unpaid the sum of $9,963.57. This suit was brought to recover that amount.

Section 272(a), quoted in the margin,[2] requires that a notice of tax deficiency be mailed to the taxpayer as a condi-
69 tion precedent to the bringing of such a suit as this. Section 272(d) provides that the taxpayer may waive the restrictions provided in subsection (a).[3] The purported waiver which Mrs. Price signed and filed recites that it is made pursuant to § 272(d).

In Mutual Lumber Co. v. Poe, 9 Cir., 66 F. 2d 904, decided in 1933, this court held that a waiver prior to the mailing of a notice of deficiency is premature and invalid.[4] It was held in effect that the waiver contemplated by the statute amounts to a waiver of the right to petition the Tax Court for a redetermination, and since there can be no such petition until the taxpayer has received a notice of tax deficiency, there is nothing to waive until such a notice has been mailed.

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[2] Section 272(a) as amended by the act of December 29, 1945, 59 Stat. 673, chap. 652, § 203, reads as follows:

"[(a) (1) Petition to the Tax Court of the United States.] If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia, as the ninetieth day) the taxpayer may file a petition with the Tax Court * * * for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *"

[3] Section 272(d) reads:

"(d) Waiver of restrictions. The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency."

[4] This case involved the effect of a waiver under § 274(d) of the Revenue Act of 1926. That section, however, corresponds with § 272(d) of the 1939 code.

The holding in Mutual was reaffirmed in McCarthy Co. v. Commissioner of Internal Revenue, 9 Cir., 80 F. 2d 618,
70 decided in 1935. It was also followed in East Bay Water Co. v. McLaughlin, D.C.N.D. Cal., 24 F. Supp. 222, decided in 1938.[5]

The purport of these decisions, in so far as the present case is concerned, is that a taxpayer may not waive the requirement that a notice of tax deficiency be mailed to him. They therefore appear to be dispositive of the present appeal.

The government contends, however, that the Mutual and McCarthy decisions are not controlling here because they were concerned with the timeliness of the assessment, not the right to sue without first mailing a notice of deficiency. In both Mutual and McCarthy the question presented was whether a waiver prior to any deficiency notice prevented a subsequent notice of deficiency from tolling the statute of limitations on the assessment and collection of taxes.

It is true that in these earlier cases the significance to be attached to a holding that the waiver was invalid was different than it is here. In Mutual and McCarthy it was to the advantage of the government to have the waivers declared invalid, while here the advantage of doing so lies in favor of the taxpayer. But the basic question is the same in all three cases—was the waiver valid when filed prior to the mailing of a notice of deficiency? If, as we held in Mutual and McCarthy, it was invalid and so rendered the subsequently filed notices effective in suspending the statute of limitations, it must likewise be invalid for any purpose. If invalid for any purpose, it did not relieve the commissioner from the statutory requirement of mailing a notice prior to commencing this suit.

The government further argues that the rule laid down in these earlier cases was repudiated in Monge v. Smyth, 9 Cir., 229 F. 2d 361.

The taxpayer there sought to enjoin the collection of taxes and penalties. The government moved to dismiss the appeal on the ground that the court was without jurisdiction to entertain the action. The statute relied upon by the government was 26 U.S.C.A., § 3653(a), which provides:

71 "Except as provided in section 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the as-

[5] An appeal taken in that case was dismissed by stipulation, 104 F. 2d 1016.

sessment or collection of any tax shall be maintained in any court."

The motion to dismiss was granted, and the taxpayer appealed. He sought to avoid the effect of 26 U.S.C.A., § 3653(a) by bringing himself within the exception provided in § 272(a). Under that exception (see footnote 2), the making of an assessment or the beginning of a proceeding or distraint during the time the prohibition of § 272(a) is in force "may be enjoined by a proceeding in the proper court." The prohibition referred to forbids the commissioner from making an assessment of a deficiency, or beginning or prosecuting a distraint or proceeding in court for its collection, until a notice of deficiency has been mailed and until the expiration of ninety days thereafter, and, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final.

Invoking these statutory provisions, the taxpayer contended that the prohibition of § 272(a) was in force, and the proceeding to collect the taxes could therefore be enjoined because no notice of deficiency had been issued. The court rejected this contention, holding that a waiver which the taxpayer had signed on U.S. Treasury Form 870 FS obviated the need for sending the formal notice.

If the waiver form signed in Monge is the legal equivalent of the waiver form signed in Mutual and McCarthy (and the instant case), the Monge case unquestionably announces a rule contrary to that stated in the earlier decisions. The taxpayer argues strenuously that the waiver forms are not equivalents. The government takes the opposite position.

We need not resolve this question, however, since careful analysis of the Monge opinion indicates that all that was said concerning the validity of the waiver is dictum. The court there stated, in the last paragraph of its opinion, that a deficiency notice had been sent to the taxpayer, and that the distraint proceedings sought to be enjoined had not been commenced until more than ninety days thereafter. This being so, the exception to 26 U.S.C.A., § 3653, on which
72 the taxpayer relied, had no application, and dismissal of the taxpayer's suit for lack of jurisdiction was properly affirmed for that reason.

The prior decisions of this court cannot be overruled by dictum contained in a subsequent opinion. The rule announced in Mutual and McCarthy still stands.

The government asks us to re-examine that rule at this time. In this connection our attention is called to the language of the statutes in question, certain legislative history, and the decisions in other circuits adopting a contrary rule.[6]

We have reviewed the authorities mentioned, but have found nothing to convince us that we should now upset the long-standing rule of this circuit. It may also be noted that the desirability of achieving uniformity among the circuits is no longer an incentive for such an undertaking. Section 6213(d) of the 1954 Internal Revenue Code effectuates an amendment of § 272(d) to provide expressly that a waiver may be effective "whether or not a notice of deficiency has been issued."

AFFIRMED.

[File endorsement omitted.]

73 In United States Court of Appeals for the Ninth Circuit

No. 15662

UNITED STATES OF AMERICA, APPELLANT

v.

SYDELLE PRICE, APPELLEE

Judgment

Filed and entered January 2, 1959

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted.]

74 [Clerk's certificate to foregoing transcript omitted in printing.]

[6] Moore v. Cleveland Ry. Co., 6 Cir., 108 F. 2d 656; Associated Mutuals v. Delaney, 1 Cir., 176 F. 2d 179.

75 Supreme Court of the United States

No. 809, October Term, 1958

UNITED STATES, PETITIONER

v.

SYDELLE PRICE

Order allowing certiorari

May 18, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE: 1959